(3)

No. 02-1031

IN THE

Supreme Court of the United States

STEPHEN BARRY SCHER,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

REPLY BRIEF

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B. The Petitioner does not request that this Honorable Court make a determination of the sufficiency of the evidence as found by the Pennsylvania Supreme Court, but simply requests that it grant certiorari to resolve the question of what is the correct pre-arrest delay due process analysis under *Marion* and *Lovasco* and the United States Constitution, and apply the same to this case. 5

C. If this Honorable Court were to grant certiorari and reverse the decision of the Pennsylvania Supreme Court, it would not be setting a statute of limitations for murder prosecutions, but would only be upholding the Constitution and

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INTRODUCTION

Respondent has provided no persuasive reason for this Court not to grant certiorari and leave unreviewed the Supreme Court of Pennsylvania's decision, entered August 21, 2002, (App. 1a-132a), which reversed the holding of the Pennsylvania Superior Court, (App. 133a-153a), that had discharged the Petitioner, finding that his due process rights were violated by the Commonwealth of Pennsylvania's prejudicial and improper twenty-year pre-arrest delay in this case. The Pennsylvania Supreme Court reversed, even though it was evenly split regarding whether the Petitioner suffered actual prejudice through the deaths of witnesses, and deterioration, loss of and destruction of evidence during the decades-long delay.[1] Although it was uncontradicted that, from the time of the alleged crime in 1976, the Petitioner was always the prime suspect, and, at the time of Petitioner's arrest, the Commonwealth possessed no more evidence or information than was readily available to it and obtainable by it at the time of the alleged crime, if its investigation had not been grossly negligent and/or non-existent for vast periods of time, the Pennsylvania Supreme Court denied relief to the Petitioner.[2]

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1. Justice Thomas G. Saylor was one of three of six justices who concluded that the Petitioner was actually prejudiced by the government's inordinate delay. However, Justice Saylor voted to reverse the Pennsylvania Superior Court because he believed that this Court's decisions in *United States v. Marion*, 404 U.S. 307 (1971) and *United States v. Lovasco*, 431 U.S. 783 (1977) require a defendant to establish that he was substantially prejudiced by a pre-arrest delay, in order to satisfy the first prong of the pre-arrest delay due process test set forth therein. (App. 74a-76a).

2. The Opinion announcing the Judgment of the Pennsylvania Supreme Court unduly restricted the circumstances in which a pre-arrest delay will be found to violate due process, stating that only an

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The Respondent has done nothing to damage the propositions set forth by the Petitioner, which strongly support and warrant that this Honorable Court grant certiorari from the Pennsylvania Supreme Court's decision. The Respondent ignores that the Pennsylvania Supreme Court's decision flatly conflicts with the settled principles of due process set forth by this Court in *United States v. Marion*, 404 U.S. 307 (1971), and *United States v. Lovasco*, 431 U.S. 783 (1977). It dismisses the fact that the decision of the Pennsylvania Supreme Court cannot be reconciled with the decisions of many other state courts of last resort and decisions of United States courts of appeals, which have applied *Marion*, *supra*, and *Lovasco*, *supra*, in circumstances not fairly distinguishable from the case at hand. Finally, it does not even discuss whether certiorari should be granted now because of the substantial, seriously adverse and recurring effects that the Supreme Court of Pennsylvania's ruling, as well as the inconsistent interpretation and application of state court's of last resort and the United States courts of appeals, will have on the ability of citizens to defend themselves in a manner consistent with due process.

ARGUMENT

Pursuant to United States Supreme Court Rule 15.6, the Petitioner hereby addresses the following new points raised in the Respondent's Brief in Opposition.

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intentional delay by the government to gain a tactical advantage over a defendant, or a delay which occurs because of conscience-shocking behavior on behalf of the government, would constitute an improper and unconstitutional delay. (App. 33a-34a, 51a).

A. Regardless of the Commonwealth's dismissal of the split in the state courts of last resort and the United States courts of appeals of this nation, regarding the application of the two prongs of the *Marion/Lovasco* pre-arrest delay due process analysis, as mere "nuanced legal analysis", it cannot escape the conclusion that, depending upon the jurisdiction which prosecutes a defendant, he will receive differing levels of due process under the United States Constitution.

The Respondent contends that differences in national application of the *Marion/Lovasco* pre-arrest delay due process analysis, referenced in Petitioner's petition,[3] are merely natural by-products of "nuanced legal analysis", not errors of constitutional dimension requiring the correction of this Honorable Court. *Brief in Opposition*, at 1. However, Respondent cannot escape the conclusion that, depending upon the jurisdiction which prosecutes a defendant, the due process protections applicable under the United States Constitution will differ in serious and significant respects. The unequal administration and application of the *Marion/Lovasco* analysis by the state courts of last resort and United States courts of appeals of this nation are unfair to defendants and erodes concepts of due process and equal justice. The conflicts should be corrected by this Honorable Court.

The differing standards which the various courts across this nation have set forth regarding the prejudice prong of the *Marion/Lovasco* analysis, two of which are illustrated by the differing standards employed by the Pennsylvania Supreme Court's justices in this case, (App. 33a-34a, 56a-57a, 72a, 74a-76a, 99a n.3, 113a-114a), and regarding the second prong of the *Marion/Lovasco* analysis, three of which

3. *See Petition for Writ of Certiorari*, at 16-26.

were adopted by the various Pennsylvania Supreme Court justices in this case, (App. 33a-34a, 51a, 70a, 97a-113a), are not "distinctions without a difference", as contended by the Respondent. *Brief in Opposition*, at 4. If the Pennsylvania Supreme Court justices had all applied the "actual prejudice" standard set forth by this Honorable Court in *Marion*, 404 U.S. at 324-326, and *Lovasco*, 431 U.S. at 789-790, the Petitioner would have been found to have satisfied the first prong of the *Marion/Lovasco* analysis. If the Pennsylvania Supreme Court justices had all applied the "balancing" standard, applied by the two members of the dissent, and discussed by this Honorable Court in *Marion*, 404 U.S. at 324-325, and *Lovasco*, 431 U.S. at 790-797, the Petitioner would have been found to have satisfied the second prong of the *Marion/Lovasco* analysis.

These unfair and unconstitutional results highlight the problems which have arisen over the twenty-five years since this Court decided *Lovasco*. Depending upon the jurisdiction which prosecutes a defendant, the due process protections applicable will differ in significant and serious respects. Taken to its extreme, in one jurisdiction, the charges against a capital defendant could be dismissed because his due process rights would have been violated by an "actually prejudicial" and "grossly-negligent" and improper pre-arrest delay, while, in another jurisdiction, the same delay would not be found to violate due process, because the prejudice from the delay would not have been "substantial", or something more than "actual" prejudice, and the delay would not have been "intentional". In the first jurisdiction, the charges against the capital defendant would be dismissed, while, in the second, the defendant would be executed. This untenable result should not be permitted to occur.

B. The Petitioner does not request that this Honorable Court make a determination of the sufficiency of the evidence as found by the Pennsylvania Supreme Court, but simply requests that it grant certiorari to resolve the question of what is the correct pre-arrest delay due process analysis under *Marion* and *Lovasco* and the United States Constitution, and apply the same to this case.

The Respondent avers that the Petitioner requests this Court to make a determination of the sufficiency of the evidence as found by the Pennsylvania Supreme Court, relative to the first and second prongs of the *Marion/Lovasco* analysis. However, as is evident from the Petitioner's Questions Presented, when taken in context, the Petitioner simply is requesting that this Court consider the circumstances in which the United States Constitution requires that a criminal information be dismissed because of delay between the commission of an offense and the initiation of prosecution. The Petitioner asks this Court to grant certiorari to prescribe the correct pre-arrest delay due process standard and analysis under *Marion* and *Lovasco* and the United States Constitution, and apply the same to this case — something the Pennsylvania Supreme Court failed to do.

Without question, if this Court grants certiorari, some factual examination of the record in this case will be necessary. However, this is not an impermissible task, but a required one. To be sure, this Court has not hesitated to undertake independent examination of factual issues when constitutional claims may depend on their resolution. In fact, this is exactly what occurred in *Lovasco*. 431 U.S. at 796. *See also, e.g., Napue v. People of State of Illinois*, 360 U.S. 264, 271-72 (1959); *Fiske v. State of Kansas*, 274 U.S. 380, 385-86 (1927). *Cf., Hoffa v. United States*, 385 U.S. 293 (1966). This Honorable Court has stated that it is its duty to

make its own independent examination of the record when federal constitutional deprivations are alleged, resting on its solemn responsibility for maintaining the Constitution inviolate. *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816); *Cooper v. Aaron*, 358 U.S. 1 (1958). This principle was well stated in *Niemotko v. State of Maryland*, 340 U.S. 268, 271 (1951):

> In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will reexamine the evidentiary basis on which those conclusions are founded.

It is so well settled that, in 1954, the Court was able to speak in *Kern- Limerick, Inc. v. Scurlock*, 347 U.S. 110, 121 (1954), of the "long course of judicial construction which establishes as a principle that the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest." *See also, e.g.*:

> *Payne v. State of Arkansas*, 356 U.S. 560, 562 (1958); *Leyra v. Denno*, 347 U.S. 556, 558 (1954); *Avery v. State of Georgia*, 345 U.S. 559, 561 (1953); *Feiner v. People of State of New York*, 340 U.S. 315, 322, 323, note 4 (1951) (dissenting opinion); *Cassell v. State of Texas*, 339 U.S. 282, 283 (1950); *Haley v. State of Ohio*, 332 U.S. 596, 599 (1948); *Malinski v. People of State of New York*, 324 U.S. 401, 404 (1945); *Ashcraft v. State of Tennessee*, 322 U.S. 143, 149 (1944); *Ward v. State of Texas*, 316 U.S. 547, 550 (1942); *Smith v. State of Texas*, 311 U.S. 128, 130 (1940); *State of South Carolina v. Bailey*, 289 U.S. 412, 420 (1933). *See also, e.g., Roth v. United States*, 354 U.S. 476, 497 (1957) (dissenting opinion); *Stroble*

> *v. State of California*, 343 U.S. 181, 190 (1952); *Sterling v. Constantin*, 287 U.S. 378, 398 (1932); *Southern Pacific Co. v. Schuyler*, 227 U.S. 601, 611 (1913); *Creswill v. Grand Lodge Knights of Pythias*, 225 U.S. 246, 261 (1912).

Mr. Justice Holmes, writing for the Court, recognized the principle many years ago in *Davis v. Wechsler*, 263 U.S. 22, 24 (1923):

> If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of a state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds.

If this Honorable Court grants Petitioner's request for certiorari, to clarify the circumstances in which a pre-arrest delay violates the due process rights of a defendant, it, of course, will need to undertake independent examination of factual issues, as the constitutional claims herein may depend on their resolution. However, this is far from an invitation to make a determination of the "sufficiency of the evidence as found by the Pennsylvania Supreme Court". It is a request to correct the erroneous standard set forth by the Pennsylvania Supreme Court in this case.

C. If this Honorable Court were to grant certiorari and reverse the decision of the Pennsylvania Supreme Court, it would not be setting a statute of limitations for murder prosecutions, but would only be upholding the Constitution and protecting the due process rights of defendants from oppressive, prejudicial and improper pre-arrest delays.

The Respondent disingenuously argues that when the Pennsylvania Superior Court held that the Petitioner's due process rights were violated by the Commonwealth's prejudicial and improper twenty-year delay, it set a "statute of limitations for murder", stating that it overrode the statutory directive that the passage of time will not insulate against prosecution for murder. *Brief in Opposition*, at 8. However, the protecting and safeguarding of a defendant's due process right to a fair trial by a court does not set a statue of limitations for murder. It merely upholds a defendant's rights under the Constitution. A government's pre-arrest delay could last for one hundred (100) years without violating a defendant's due process rights, if it either does not cause actual prejudice to the defendant, and/or the reason(s) for the delay is proper. It is the prejudice to a defendant's due process right to a fair trial from the passage of time during a pre-arrest delay and the unnecessary nature of a pre-arrest delay that insulates against a prosecution, not the mere passage of time itself. The Respondent's concern in this regard is off-base and without merit.

D. The Petitioner would benefit from a grant of certiorari in this case, as it would allow this Honorable Court to correct the Pennsylvania Supreme Court's erroneous decision on the first prong of the *Marion/Lovasco* pre-arrest delay due process analysis and set forth and/or apply the appropriate standard for the second prong of the *Marion/Lovasco* analysis, or to remand this case for full consideration by the Pennsylvania Supreme Court on the second prong of the *Marion/Lovasco* analysis.

Contrary to the assertion of Respondent, *Brief in Opposition*, at 6,8, a grant of certiorari by this Honorable Court would benefit the Petitioner in this case. If this court grants certiorari, it would be free to reverse the Pennsylvania Supreme Court's holding that the Petitioner did not suffer the requisite prejudice to establish a due process violation. This reversal would then result in application of the second prong of the *Marion/Lovasco* analysis to this case, either by this Honorable Court, or upon remand to the Pennsylvania Supreme Court. Contrary to Respondent's assertion, *Brief in Opposition*, at 7-8, the Pennsylvania Supreme Court has not decided the issue, even though it was raised by the Petitioner below, and passed upon in the Opinion Announcing the Judgment of the Pennsylvania Supreme Court by Madame Justice Sandra Schultz Newman, (App. 33a-34a, 51a-52a), and by the two dissenting Pennsylvania Supreme Court justices, (App. 78a-113a), as well as the Pennsylvania Superior Court. (App. 142a-153a). In fact, Petitioner respectfully contends that, if this Honorable Court were to decide the issue, it would agree that Petitioner's due process rights have been violated by an oppressive and improper pre-arrest delay — a delay which unnecessarily spanned over twenty years and was comprised of vast periods of

government and law enforcement inactivity, with absolutely no investigation.[4,5]

CONCLUSION

For the foregoing reasons and those stated in the petition for writ of certiorari, the petition for a writ of certiorari should be granted.

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4. The Petitioner was always the prime and only suspect in the alleged crime.

5. Any evidence used to arrest the Petitioner was readily available and obtainable at the time of the alleged crime. As stated by former Justice Brennan in his concurring opinion in *Dickey v. Florida*, which was pointed to by this Honorable Court in *Lovasco*, 431 U.S. at 797 n. 19:

> the crucial question in determining the legitimacy of governmental delay may be whether it might reasonably have been avoided — whether it was unnecessary. To determine the necessity for governmental delay, it would seem important to consider, on the one hand, the intrinsic importance of the reason for the delay, and, on the other, the length of the delay and its potential for prejudice to interests protected . . . For a trivial objective, almost any delay could be reasonably avoided. Similarly, lengthy delay, even in the interest of realizing an important objective, would be suspect.

398 U.S. 30, 51-52 (1970) (Brennan, J., concurring). The Commonwealth's pre-arrest delay violates due process.

Respectfully submitted,

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